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WAYTHA MOORTHY PONNUSAMY & ORS v. YB DATO' SERI DR AHMAD ZAHID HAMIDI – TIMBALAN PERDANA MENTERI/MENTERI DALAM NEGERI & ORS

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COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
S NANTHA BALAN JCA
AZMAN ABDULLAH J
[CIVIL APPEAL NO: W-01(IM)-181-03-2018]
8 AUGUST 2022

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Abstract – *Declarations will not be granted unless all parties who will be affected by such declarations are properly named as a party and are before the court. Only in the rarest of rare cases would a declaration, without naming the persons who would be affected by the declarations sought, be granted.*

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CIVIL PROCEDURE: *Declaration – Appeal – Applicants sought declarations that individual a threat to security and public of Federation and not fit to be permanent resident of Malaysia – Individual not named as party to action – Whether omission to name individual impediment to granting of declarations – Whether court could grant against party not before court*

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CIVIL PROCEDURE: *Striking out – Originating summons – Applicants sought declarations that individual a threat to security and public of Federation and not fit to be permanent resident of Malaysia – Individual not named as party to action – Whether originating summons ought to be struck out – Rules of Court 2012, O. 18 r. 19*

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The first appellant ('first plaintiff'), the Chairman of Persatuan Hindraaf Malaysia, had written several letters to the respondents ('defendants') stating that Dr Zakir Naik ('DZN'), an Indian national and a Muslim preacher, would pose danger to the Malaysian public due to his involvement in terrorism and sought clarification as to whether he had been granted a permanent resident ('PR') status in Malaysia. When there was no reply from the defendants, the plaintiffs moved the High Court, *via* an amended originating summons ('AOS') for declarations that: (i) DZN was a threat to the security of the Federation and/or friendly relations between the Federation and/or other countries and/or public order within the Federation; and (ii) DZN was not a person fit to be a PR of Malaysia. DZN, however, was not named as a party to the AOS. The defendants applied to strike out the AOS, pursuant to O. 18 r. 19 of the Rules of Court 2012 ('ROC'), on grounds that (i) the plaintiffs had no *locus standi* and the AOS did not disclose any reasonable cause of action; (ii) the AOS was scandalous,

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frivolous and vexatious and was an abuse of the court process; (iii) the plaintiffs ought to have moved the court *via* judicial review rather than *via* the AOS; and (iv) DZN was not named as a party to the AOS ('encl. 9'). The High Court allowed encl. 9 on the basis, *inter alia*, that (i) since serious allegations had been made against DZN, he should have been named as a party to the AOS so that he could defend himself; and (ii) it was wrong for the plaintiffs to challenge the legal status of a person without that person being accorded the right to be heard. The AOS was accordingly struck out. Hence, the present appeal.

Held (dismissing appeal with costs)
Per Azman Abdullah J delivering the judgment of the court:

(1) The omission to name the targeted person who would be affected by the declarations sought *ie*, DZN, was not an impediment to the granting of the declarations. However, that is reserved for the rarest of rare cases. The exception to the rule is that declarations should not be granted against a party who is not before the court and whose rights and interest would be affected by the granting of the said declaration. (para 38)

(2) The plaintiffs had taken a shortcut by not naming DZN and expecting or anticipating that, because of the publicity surrounding this case, he would be alerted accordingly and would intervene in the AOS. The plaintiffs, as the protagonist of the proceedings, had the burden of naming all relevant parties who could be affected by the reliefs sought. Here, no reliefs were sought against the defendant and, instead, all the reliefs were targeted at DZN. The failure to name DZN as a party to the AOS rendered the proceeding incompetent as the court would end up making declarations against a party who was not before the court. The declarations sought, if allowed, would be a *fait accompli* and could be used in other proceedings to impugn DZN's PR status. (paras 44-46)

(3) The plaintiffs' claims were, on the face of it, 'obviously unsustainable' and should be struck out. The plaintiffs ought to have commenced a judicial review instead of filing the AOS as the reliefs sought were essentially an indirect effort at impugning the decision of the relevant public authority to grant PR status to DZN. This was essentially a matter of public law and not private law. (para 51)

Case(s) referred to:
Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(dist)***
Dow Jones v. Gutnick 210 CLR 575 ***(refd)***

Hanson v. Radcliffe Urban District Council [1922] 2 Ch 490 ***(refd)***
John v. Rees [1970] Ch 345 ***(refd)***
Johnco Nominees Proprietary Ltd v. Albury-Wodonga (NSW) Corporation [1977] 1 NSWLR 43 ***(refd)***
Karpal Singh v. Sultan Of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Sekar Kandasamy v. Lembaga Wakaf Hindu Pulau Pinang & Ors [2022] 1 LNS 2111 CA ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)
Rules of Court 2012, O. 18 r. 19(1), O. 53

For the appellants - Gopal Sri Ram, R Kengadharan, Karthigesan Shanmugam, Kanagavalli Krishnamoorthy, Phyllia Lim & Athanasia Yolanda; M/s Karthig Shan
For the respondents - Suzana Atan; DPP
For the intervener - Noor Atiqah Zainal Abidin; M/s Adnan Sharida & Assocs

[Editor's note: For the High Court judgment, please see Waytha Moorthy Ponnusamy & Ors v. Yab Dato Seri Dr Ahmad Zahid Hamidi & Ors; Dato Ibrahim Ali (Intervener) [2018] 1 LNS 2124 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Azman Abdullah J:

Introduction

[1] This is an appeal against the decision of the High Court in allowing the respondents'/defendants' application in encl. 9 to strike out the Amended Originating Summons No: WA-24-10-03-2017 ("the AOS"). For ease of reference, parties will be referred to by their titles in the proceedings before the High Court, *ie*, appellants as "plaintiffs" and respondents as "defendants".

[2] We heard the appeal on 8 August 2022. Having duly considered the appeal records and submissions of counsel, we unanimously decided to dismiss the appeal. Our reasons for dismissing the appeal now follow.

Background Facts

[3] The individual who is at the epicentre of the proceedings before the High Court and in the appeal before us is one Dr Zakir Naik who is an Indian national and a Muslim preacher. The plaintiffs contend that Dr Zakir Naik is involved with the terrorist activities and is also on the "wanted person" list in India.

[4] The plaintiffs allege that Dr Zakir Naik has incurred the wrath of several countries and has been barred from entering a few of these countries. The plaintiffs took umbrage with the fact that despite Dr Zakir Naik's questionable background, the Government of Malaysia has seen it fit to grant him Permanent Resident ("PR") status in Malaysia. The first plaintiff who is the Chairman of a non-governmental organisation known as 'Persatuan Hindraaf Malaysia' or "HINDRAAF" brought the action for and behalf of the rest of the plaintiffs.

[5] Before filing the AOS, the first plaintiff wrote several letters to the respondents and stated that Dr Zakir Naik will pose a danger to the Malaysian public due to his involvement in terrorism and sought clarification/confirmation as to whether he had been granted PR status in Malaysia. However, there was no reply whatsoever from the defendants. They accordingly moved the High Court *via* the AOS for declarations in regard to Dr Zakir Naik's status as a PR in Malaysia. The parties named as defendants in the AOS are the Minister of Home Affairs, the Director General of the Immigration Department, the Director General of the National Registration Department, the Inspector General of Police and the Government of Malaysia. It is to be noted rather significantly that, Dr Zakir Naik was not named as a party to the AOS.

[6] The plaintiffs sought to obtain the following orders *via* the AOS:

> (i) Satu Deklarasi bahawa Dr Zakir Naik adalah merupakan seorang yang mengancam Keselamatan Persekutuan dan/atau hubungan persahabatan antara Persekutuan dan/atau Negara-negara lain dan/atau ketenteraman awam dalam Persekutuan." and
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> (ii) Satu Deklarasi yang berbangkit bahawa Zakir Naik bukan merupakan seorang yang layak untuk menjadi penduduk tetap Malaysia.

[7] Essentially, the declarations when translated into English read as follows:

(i) a declaration that Dr Zakir Naik is a person who is a threat to the security of the Federation and/or friendly relations between the Federation and/or other countries and/or public order within the Federation; and

(ii) a consequential declaration that Dr Zakir Naik is not a person fit to be a PR of Malaysia.

[8] In the AOS and as later elaborated in the affidavit, the plaintiffs relied on the following averments to secure the declarations:

> (i) Dr Zakir Naik merupakan seorang yang mampu mengancam keselamatan negara, keharmonian dan keamanan sejagat rakyat Malaysia kerana Dr Zakir Naik secara terbuka telah mengalakkan keganasan (terrorism).

(ii) Dr Zakir Naik adalah seorang individu yang mengancam keadaan ekonomi, industri, sosial dan pendidikan Negara.

(iii) Dr Zakir Naik juga merupakan seorang individu yang telah dihalang masuk di beberapa buah negara atas alasan bahawa beliau disyaki bekerjasama dengan beberapa kumpulan pengganas.

(iv) Dr Zakir Naik adalah seorang individu yang amat bahaya yang boleh menjejas perpaduan masyarakat, toleransi dan perhubungan antara pelbagai kaum.

(v) Kehadiran Dr Zakir Naik ini juga mengundang ancaman kepada keselamatan serta keamanan dan prinsip moral di negara kita.

(iv) Dr Zakir Naik seorang yang boleh memberi dorongan/motivasi/ inspirasi kepada warga asing yang berada di Malaysia untuk melakukan keganasan dan mengganggu ketenteraman awam.

[9] The defendants filed an application (encl. 9) to strike out the AOS under O. 18 r. 19 of the Rules of Court 2012 ("ROC 2012") on the grounds that the plaintiffs have no *locus standi* and that the AOS does not disclose any reasonable cause of action, that the AOS is scandalous, frivolous and vexatious and is an abuse of the process of the court. The defendants maintained that the plaintiffs ought to have moved the court *via* Judicial Review rather than *via* the AOS. One of the key objections that was raised by the defendants was predicated on the failure to name Dr Zakir Naik as a party to the AOS.

Decision Of The High Court

[10] On 13 February 2018, the learned High Court Judge ("judge") allowed the defendants' application per encl. 9 with costs. On the first declaration which the plaintiffs are seeking *ie*, to declare that Dr Zakir Naik is a person who will threaten the security of the Federation and/or the relationship between the Federation and other countries and/or public security, the judge opined that this prayer is frivolous and vexatious and an abuse of the process of the court in as much as it is a declaratory order against a person who is not before the court.

[11] The plaintiffs also contended that said Dr Zakir Naik is alleged to be a person who posed a threat to the economy, industry, social and the education system in Malaysia and a dangerous person who can instigate others in Malaysia to create acts of terrorism in this country.

[12] The judge was of the view that since serious allegations have been made against Dr Zakir Naik, he should have been named as a party to the AOS so that he could defend himself against these accusations. According to the judge, the grounds relied upon the plaintiffs in regard to Dr Zakir Naik being a threat to the security of the Federation and/or friendly relations between the Federation and/or other countries and/or a threat public order

within the Federations relates to Dr Zakir Naik personally, and since he had not been made a party in the AOS, the first declaratory prayer is frivolous and vexatious.

[13] Likewise, as regards the second prayer for a declaration that Dr Zakir Naik is not a fit person to be granted PR status of Malaysia the judge was of the view that the declaration directly affects Dr Zakir Naik's rights *albeit* that he was not made a party in the AOS. Therefore, in the absence of Dr Zakir Naik, the court would not be in a position to adjudicate upon the issue without a proper hearing, as the facts cannot be properly investigated and verified.

[14] The judge took the view that it was wrong for the plaintiffs to challenge the legal status of a person without that person being given a right to be heard. Hence, in the absence of the person concerned the court cannot declare a person as being not fit to be a PR as this will violate the most basic rule of natural justice, *ie*, that no man should condemned without being afforded a right to be heard.

[15] Premised on the reasons enumerated above, the defendants' application to strike out the AOS was allowed by the High Court with costs.

[16] Dissatisfied with the decision, the plaintiffs filed this appeal.

The Appeal

[17] The grounds of appeal are as per the memorandum of appeal which reads as follows:

> (i) Yang Arif Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dengan membatalkan Saman Pemula yang telah difailkan oleh Perayu-perayu di bawah Aturan 18 Kaedah 19 Kaedah-kaedah Mahkamah 2012.
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> (ii) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila membenarkan Notis Permohonan Responden-Responden di bawah Aturan 18 Kaedah 19 Kaedah-kaedah Mahkamah 2012 atas alasan bahawa Saman Pemula Perayu-perayu adalah remeh atau menyusahkan dan penyalahgunaan proses Mahkamah walaupun tiada bukti melalui affidavit.
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> (iii) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk mengambil kira fakta bahawa PERKASA menjadi pencelah dalam tindakan ini demi untuk menjaga kepentingan "interest" Zakir Naik.
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> (iv) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk mengambil kira fakta bahawa Responden tidak memfailkan sebarang afidavit dan tiada sebarang bukti sokongan untuk menyangkal kandungan afidavit Perayu.

(v) Yang Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk mengambil kira bahawa kes yang dirujuk *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) adalah tidak terpakai.

(vi) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa bukti-bukti yang disertakan dan dilampirkan dalam Affidavit Sokongan Perayu adalah keterangan "Hearsay" walaupun tiada sebarang keterangan untuk menyangkal.

(vii) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk mengambil kira fakta bahawa tuntutan Perayu adalah terhadap Responden-Responden sebagai pihak-pihak yang bertanggungjawab atas kegagalan dalam menjalankan tugas dimana Responden-Responden telah gagal untuk mengambilkira faktor keselamatan negara.

(viii) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk mengambil kira prinsip undang-undang keputusan Mahkamah Rayuan United Kingdom yang telah melarang Zakir Naik daripada memasuki United Kingdom secara tetap atas faktor keselamatan negara.

(ix) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila telah gagal untuk mengambil kira faktor keselamatan negara malahan hanya memberi keutamaan kepada kepentingan Zakir Naik berdasarkan kepada permohonan yang dibuat oleh pihak Responden.

(x) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam memutuskan saman pemula Perayu-perayu adalah satu penyalahgunaan proses Mahkamah tanpa mengambil kira bahawa tuntutan Perayu-perayu adalah berdasarkan kepada keselamatan negara.

(xi) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam memutuskan saman pemula Perayu-perayu adalah satu tuntutan yang remeh dan menyusahkan tanpa mengambil kira bahawa tuntutan Perayu-perayu adalah berdasarkan kepada keselamatan negara.

Submissions

[18] The defendants contended that the plaintiffs have no *locus standi*. The plaintiffs' response was that the requirement of *locus standi* does not apply to the AOS because the plaintiffs have an unqualified and unrestricted right of access to justice which is guaranteed by art. 5(1) of the Federal Constitution. Being a rule of the common law, *locus standi* must yield to the constitutional right of access to justice vested in the plaintiffs. The plaintiffs relied on the case of *Dow Jones v. Gutnick* 210 CLR 575 (at p. 614) where Kirby J said as follows:

> The responsibilities of this Court extend to the re-expression of the common law of Australia. However, the Court is bound by the Constitution. No principle of the common law may be inconsistent with its language or implication of the common law may be inconsistent with its language or implication.

[19] In any event, it was submitted for the plaintiffs that they have *locus standi* because this is a public interest litigation. This form of litigation is recognised by our law. The Federal Court in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145 at p. 546 (CLJ); p. 161 (MLJ) stated as follows:

> The test for determining – whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v. Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:
>
> > *Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law*, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court no to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.
> >
> > (emphasis added)

[20] Therefore, it was submitted for the plaintiffs that the AOS is for the preservation of harmony in a multiracial society in Malaysia. The very fact that Dr Zakir Naik is allowed to be a PR in Malaysia by the defendants will disrupt this harmony and the rule of law. According to the plaintiffs, the real purpose of the AOS is therefore the vindication of the rule of law.

[21] Besides, Pertubuhan Pribumi Perkasa Malaysia ("Perkasa") had also been permitted to intervene the proceedings. The defendants did not oppose the application. It was submitted for the plaintiffs that in view of Perkasa's intervention in the proceedings, the defendants' argument that the plaintiffs have no *locus standi* is untenable.

[22] Besides the issue on *locus standi*, counsel for the plaintiffs also submitted on the cause of action. According to the plaintiffs, in determining whether the plaintiffs have a reasonable cause of action, one must look at the relief sought in this case in which the plaintiffs' claims are for declaratory relief. As such, there is no need for a cause of action where declaratory relief is sought.

[23] In any event, it was submitted for the plaintiffs that they have a reasonable cause of action because the affidavit sufficiently pleads facts to show that Dr Zakir Naik is a threat to the national security of Malaysia. Reference was made to newspaper reports in the plaintiffs' affidavit which show that Dr Zakir Naik is by his words and messages a threat to public security.

[24] Our attention was drawn to the following passage in *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 (FC), where Abdoolcader J (as he then was) (at p. 179) referred to the judgment of Hutley, JA, in *Johnco Nominees Proprietary Ltd v. Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43 where it was said:

> The reality of the situation is that so far from a legal right having to precede a declaration, **the declaratory procedure can actually generate rights**.
>
> (emphasis added)

[25] Accordingly, it is submitted that the plaintiffs' case is not plainly and obviously unsustainable. For the purpose of deciding whether a pleading discloses a reasonable cause of action, the facts pleaded must be presumed to be true.

[26] The plaintiffs further submitted that Dr Zakir Naik is not a necessary party because the plaintiffs are seeking declaratory relief against those who granted him PR and protecting him, namely the defendants. Hence, Dr Zakir Naik's interests are sufficiently protected by the defendants. In any event, declaratory relief can be granted even if the concerned person is not a party. The plaintiffs relied upon the Supreme Court's decision in *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72; [1992] 1 MLJ 697 (SC) ("*Nordin*'s case"). *Nordin*'s case is dealt with in some detail in the later part of this judgment.

[27] As for the respondents' objection in regards to the mode of commencement of legal proceedings and in particular that the plaintiffs ought to have commenced judicial review proceeding rather than filing the AOS, it was submitted for the plaintiffs that they are not seeking to quash the decision of the defendants to grant PR status to Dr Zakir Naik but are instead seeking declaratory relief that, *inter alia*, "Dr Zakir Naik is a person who is a threat to the security of the Federation". Therefore, there is no need to bring this action by way of judicial review. In any event, using the wrong mode of commencement is only an irregularity and therefore not fatal to the plaintiffs' case.

[28] It was submitted for the defendants that AOS did not disclose any reasonable cause of action against the defendants and the reliefs sought are clearly targeted at Dr Zakir Naik who is not a party to the action. The defendants further submitted that the plaintiffs' claims are scandalous, frivolous and vexatious as it is clear that the plaintiffs do not have any *locus*

standi to bring this action against the defendants. The plaintiffs failed to plead or show their legal interest or rights that are affected with the giving of the entry permit or PR status to Dr Zakir Naik.

[29] According to the defendants, the plaintiffs' claims are also an abuse of the process of the court as the plaintiffs had filed the AOS, instead of an application for judicial review under O. 53 of the ROC 2012.

[30] With regard to the defendants' striking out application, the trite principles applicable to striking out applications are as enunciated by the Federal Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293; [1985] 2 MLJ 385 at p. 386 which held as follows:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: the summary procedure under this rule can only be adopted when it can be seen that a claim or answer is on the face of it 'obviously unsustainable'.

[31] The defendants submitted that applying the principles of striking out, the plaintiffs' claim is obviously unsustainable as it is scandalous, frivolous and vexatious and an abuse of the process of the court.

[32] The defendants further submitted that the plaintiffs' action is also clearly flawed as it lacks the fundamentals of cause of action, let alone a reasonable cause of action against the defendants. According to the defendants there is no cause of action that the plaintiffs can possibly plead or raise against the defendants because all that have been alleged is based on mere conjecture and bare allegations. Instead, the reliefs sought are predicated on allegations made against a third party namely, Dr Zakir Naik who is not a party to the AOS.

[33] The defendants also submitted on the newspaper reports which were relied upon by the plaintiffs. The defendants contend that such reports are hearsay evidence which cannot be used to take away the legal rights of an individual.

[34] It was submitted for the defendants that there was no appealable error in the High Court's decision as the judge was correct in striking out the AOS.

Our Decision

[35] The law governing striking out applications under O. 18 r. 19(1) of ROC 2012 is as stated in the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 (SC) where the Supreme Court decided that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. *It is only in plain and obvious cases that recourse should be had*

A *to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'*. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

(emphasis added)

B **[36]** The question that arises is whether the AOS ought to be struck out in the instant case by reason of it being 'obviously unsustainable'.

[37] In this regard, it is obvious enough that the several issues raised in the AOS are very serious and it involves or jeopardises Dr Zakir Naik's status
C as a PR of Malaysia and this in turn gives rise to the question whether he is a threat to national security and/or friendly relations between the Federation and foreign states. It is also clear and obvious that *via* the AOS, the plaintiffs are directly challenging Dr Zakir Naik's suitability and qualification to be accorded with the status of PR of Malaysia.

D **[38]** In so far, as the failure to name Dr Zakir Naik as a party to the AOS, we accept the proposition that in certain circumstances, the omission to name the targeted person who will be affected by the declaration sought is not an impediment to the granting of the declarations. But that is reserved for the rarest of rare cases. In our view, the observation of the Supreme Court in
E *Nordin*'s case is an exception to the rule that declarations should not be granted against a party who is not before the court and whose rights and interest will be affected by the grant of the said declaration. We think that it is necessary for us to elaborate on *Nordin*'s case to demonstrate why it is a "rare" case where the breach of natural justice was not an impediment to
F the grant of declaratory relief.

[39] The facts of *Nordin*'s case as summarised in the MLJ report, are as follows:

The respondents were elected members of the Kelantan State Legislative Assembly at a general election. However, pursuant to art XXXIA of the
G Kelantan Constitution, the State Legislative Assembly of Kelantan passed a resolution that the first and second respondents, who had resigned from the political party for which they stood and were elected in the elections, had ceased to be members of the legislative assembly and their seats were declared vacant. A by-election was held in the constituencies concerned, wherein the first and second respondents stood for election but they were
H defeated. One Haji Samat and one Haji Mahmud were the successful candidates elected in their place. Subsequently the respondents brought an action in the High Court seeking a declaration that art XXXIA of the Kelantan Constitution was invalid, null and void as it contravened art 10(1)(c) of the Federal Constitution guaranteeing the fundamental
I right of freedom of association. The High Court granted the declaration in favour of the respondents that art XXXIA of the Kelantan Constitution was void under art 4(1) of the Federal Constitution to the

extent that it imposes a restriction on the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party (see [1992] 1 MLJ 343). A

[40] It was contended that:

Neither Haji Samat nor Haji Mahmud or even the Election Commission had been made parties to the proceedings even though they were directly affected and it was contended that they have thereby been denied the opportunity of being heard so that there had been a breach of the rules of natural justice. B

[41] Edgar Josept Jr SCJ dealt on the issue of breach of the rule of natural justice and said (pp. 97 to 98 (CLJ); pp. 724 to 725 (MLJ): C

As for the other contention based upon the breach of the rule of natural justice, to wit, that neither Haji Samat nor Haji Mahmud had been made parties to the proceedings in the court below seeking declaratory reliefs, and so had been denied the opportunity of being heard, it is true that the grant of such reliefs would, and as events turned out, did directly affect their position, and therefore they should have been made parties to those proceedings. That, however, is not conclusive of the issue before us. Those proceedings had right from the start received considerable treatment in the local press, and both Haji Samat and Haji Mahmud must have known about them; yet they remained passive and did nothing; they made no attempt to apply to be joined as defendants, which they certainly could have done. A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affair of others to complain. D E

I find, therefore, that there is substance in the submission of counsel for the plaintiffs that the State Legislative Assembly of Kelantan is, in reality, as he put it, fighting the suit on behalf of Haji Samat and Haji Mahmud. F

In this context, I consider the following passage in the judgment of Viscount Radcliffe, speaking for the Privy Council in *Ibeneweka v. Egbuna* at p 266 to be apt:

> ... there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the court. Where, as here, the appellants had decided to make themselves the champions of the rights of those not represented – the Obosi people – and had fought the case on that basis, and where, as here, the trial judge took the view that the interested parties not represented were in reality fighting the suit, so to say, from behind the hedge, there was no principle of law which disentitled the judge from making a declaration of title in the respondents' favour. G H

I

Having regard to the very exceptional circumstances to which I have directed attention, I consider that the learned judge was not prevented from making the declarations prayed for, in the exercise of his discretion, notwithstanding the fact that two of the persons interested in the subject matter of the declarations were not before the court.

In any event, in certain circumstances, the courts may invoke the doctrine of substantive fairness, the effect of which is that natural justice may impinge upon the substance of a decision, as the following case will serve to illustrate.

In *Malloch v. Aberdeen Corp* at p 1582, Lord Reid said this:

> It was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer.

The observations of Lord Wilberforce (at pp 1594-1595) and Lord Simon (at p 1600) to the like effect are also noteworthy.

In *Merdeka University Bhd v. Government of Malaysia*, Abdoolcader J (as he then was) had occasion to refer to the observation of Lord Reid in Malloch, quoted above, and said this: 'This seems to imply that the discretion to refuse a remedy may be exercised when the court judges that natural justice would make no difference or that there was no prejudice'.

The problem of an 'inevitable result' had arisen again in the House of Lords' case of *Cheall v. APEX* where the House upheld a submission that it would have been 'a cruel deception' to observe natural justice where nothing could be said that would affect the outcome.

In the particular circumstances of the present appeal, **not forgetting that the basic question which arises for decision is the constitutional validity of art XXXIA(1) – a question of construction and therefore a pure question of law** – and the fact that neither Haji Samat nor Haji Mahmud, who it was said had been denied the opportunity of being heard, had made any attempt to be joined as co-defendants, I consider that there are ample grounds to invoke the doctrine of substantive fairness.

Having therefore considered the merits of the case I am of the view that it has been clearly demonstrated that even if Haji Samat and Haji Mahmud had been made parties to the proceedings in the court below, the result of the litigation would have been the same so that it could not be said that there was a real likelihood of their having suffered any prejudice. It follows that their non-joinder is a matter which should be condoned in the exercise of the court's discretion.

(emphasis added)

[42] It is apposite to emphasise that the general rule is that declarations will not be granted unless all parties who will be affected by such declarations are before the court. In *Sekar Kandasamy v. Lembaga Wakaf Hindu Pulau Pinang & Ors* [2022] 1 LNS 2111; [2022] MLJU 2197; [2022] 7 AMR 425; [2022]

AMEJ 1326 (CA) this court had occasion to deal with a somewhat similar situation where declaratory orders were being sought pursuant to an originating summons, the effect of which was that the decision of the Head of State of Pulau Pinang (Tuan Yang Terutama – "TYT") would be impugned. However, the Penang State Government which represents the TYT was not named as a party to the originating summons. The decision of this court touching upon this point reads as follows:

> [15] It is clear from the prayers sought in OS13 that the plaintiff is seeking to impugn the deregistration of the Society by the Third respondent and the TYT's decision *vis-à-vis* the takeover of the Temple by the First respondent. In pith and substance, the prayers sought in OS13 are targeted at the validity of the deregistration of the Society *via* the Third respondent's decision dated 7 August 2019, and the First respondent's takeover of the administration and management of the Temple per the TYT's decision dated 19 December 2019.
>
> [16] In so far as the latter decision is concerned, the decision maker, *ie*, the TYT is not before the Court. The JC opined that the State Government of Penang ought to have been named as a party, as the TYT acts under the advice of the State Executive Council *ie*, Governor in Council – (s. 4 of the 1906 Ordinance). We agree with the JC's ruling in this regard. It is trite that declarations may not be made against parties who are not before the Court. As it stands, the prayers sought in the OS *vis-à-vis* the decision of the TYT offend the principle that was established by the House of Lords in the seminal case of *London Passenger Transport Board v. Moscrop* [1942] AC 332; [1942] 1 All ER 97 HL ("Moscrop") (per Viscount Maugham) that **declarations ought not to be granted against parties who are not before the Court and who may be affected by the order**s.
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> [17] In *Majumder v. Attorney-General of Sarawak* [1967] 1 MLJ 101 (FC) the Federal Court referred to *Moscrop* and said that "**The courts should not make declarations which concern persons interested but not joined as parties.**". Hence, since the TYT is not named as a party to OS13, the decision of the TYT cannot be impugned.
>
> (emphasis added)

[43] It is trite that the grant of declaratory relief is discretionary in nature. The judicial exercise of discretion will necessarily be informed by a variety of factors and circumstances. The duty of a judge when dealing with an application for declaration was neatly summed up by Abdul Hamid Omar CJ in the case of *Karpal Singh v. Sultan Of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64 (HC) where he stated that:

> Strictly, it is a discretionary relief and the discretion is to be exercised judicially consistent with accepted principles. In the exercise of its discretion, the Court shall have regard to the facts and circumstances of each particular case before it decides to grant a declaration.

[44] Therefore, after considering the facts before us, it appears to us that the plaintiffs have taken a shortcut by not naming Dr Zakir Naik and expecting or anticipating that because of the publicity surrounding this case, he will be alerted accordingly and will intervene in this AOS.

[45] In our view, the plaintiffs as the protagonist of the proceedings have the burden of naming all relevant parties who could be affected by the relief sought. Here, no relief are sought against the defendants and instead, all the reliefs are targeted at Dr Zakir Naik. We are of the view that failure to name him as a party to the AOS renders the proceeding incompetent as the court will end up making declarations against a party who is not before the court.

[46] The declarations, if allowed, will be a *fait accompli* and can be used in other proceedings to impugn Dr Zakir Naik's PR status. In *Nordin*'s case, the issue pertained to a legal question as to whether the amendment to the state constitution was contrary to the Federal Constitution of Malaysia. In the present case, the issues are personal to Dr Zakir Naik and he must answer the serious allegations that have been made against him. Indeed, it cannot be said or assumed for a moment that he will have nothing to say or that his presence as a party to the proceedings will make no difference one way or the other.

[47] It is therefore relevant to ask – if Dr Zakir Naik had been named as a defendant, would he have something to say in response to the allegations that have been made against him? The answer to this question is quite obvious. In the present context, we think that it is necessary and imperative to quote from the judgment of Megarry VC in *John v. Rees* [1970] Ch 345, where he said (p. 402):

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

[48] No doubt some effort was made to obtain relevant information about Dr Zakir Naik but these requests were met with non-response by the defendants leading the plaintiffs to hit the proverbial brick-wall of silence. In light of that situation, the plaintiffs should have taken steps to elicit the relevant information through an application in court for discovery or *mandamus* as the case maybe.

[49] We are conscious that the jurisdiction to grant declarations is extremely wide. In this regard, it is relevant to refer to Lord Sterndale MR's judgment, in *Hanson v. Radcliffe Urban District Council* [1922] 2 Ch 490 (at p. 507) where he said that "The power of the court to make a declaration ... is now almost unlimited".

[50] Even if we accept (without concluding) that the plaintiffs may have a leg to stand on to prosecute the AOS, we think that it would be wrong in the circumstances for the High Court to grant the declaratory reliefs sought by the plaintiffs against a party who is not before the High Court to defend himself against the serious allegations made against him.

[51] Therefore, upon such failure to name Dr Zakir Naik as a party to the AOS, we find that the plaintiffs' claims are on the face of it 'obviously unsustainable' and should be struck out. We are also of the view that the plaintiffs ought to have commenced judicial review under O. 53 of the ROC 2012 instead of filing the AOS as the reliefs sought are essentially an indirect effort at impugning the decision of the relevant public authority to grant PR status to Dr Zakir Naik. This is essentially a matter of public law and not private law. See: *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 (FC)

Conclusion

[52] In the upshot, we agree with the judge and find that there is no merit in this appeal which warrants our appellate intervention. We dismissed the appeal with costs of RM5,000 to the defendants. No costs to the intervener.